LIM YAK HUA

v.

EASTERN & ORIENTAL HOTEL [1951] SDN. BHD.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 23-7-87]
14 JULY 1988

LAND LAW: *Housing Developers - Agreement to sell - Project abandoned agreed on refund of deposit and prejudgment interest rate - Issue - When should interest begin to run?*

Following the execution of the sale and purchase agreement on 20 February 1982, whereby the plaintiff had agreed to purchase the apartment at a price of RM613,000 to be paid by instalments stipulated therein and the defendant had agreed to sell the same, undertaking to give vacant possession thereof not later than December 1985. An aggregate sum of RM183,900 was paid by way of four instalments to account of the purchase price.

On 1 July 1983 the defendant accepted the opinion of their experts that the existing substructure was defective and as a result was unable to complete the construction of the tower block which was to comprise the apartment.

In consequence, there were negotiations for settlement as regards firstly the rate of interest payable on the payments to account of the purchase price aforesaid and secondly as to the date when interest should run. Agreement was reached on the first issue i.e. at 8% p.a. but not on the second issue with the result that the action herein was commenced followed shortly thereafter by the application for summary judgment.

Held:

[1] In an action for recovery of the deposit paid under a contract of sale and purchase the Court has a discretion as to whether or not to allow interest, and as from what date it should be calculated. Accordingly interest at the agreed rate of 8% p.a. on the aggregate of the four sums aforesaid from 1 July 1983 (date when the fault first exist) until date of judgment, and thereafter, pursuant to O. 42 r. 12 of the Rules of High Court, at the same rate, until realisation.

[2] Judgment for the plaintiff for the return of the aggregate sums paid under the sale and purchase agreement, amounting to RM183,900 and the costs of this application.

[3] General damages suffered by the plaintiff (if any), as a consequence of the defendant's breach of the sale and purchase agreement shall be determined by the Senior Assistant Registrar of this Court upon enquiry.

[Judgment for plantiff.]

Cases referred to:

The London, Chatham & Dover Railway Co. v. The South Eastern Railway Co. [1894] AC 429
Murtadza bin Mohamed Hassan v. Chong Swee Pian [1980] 1 MLJ 216
Macdonald v. Marson [1913] 33 NZLR 248; 16 NZGLR 330
In Re Hargreaves and Thompson's Contract [1886] 32 Ch 454
Turner v. Marriott [1897] LR 3 Eq 744
Day v. Singleton [1899] 2 Ch 320
Carlish v. Salt [1906] 1 Ch 335
Re Bryant & Barningham's Contract [1890] 44 Ch D 218

Weston v. Savage [1879] 10 Ch D 736
Skinner v. James Syphonic Measures Ltd. [1927] 28 SR (NSW) 20
Power v. Atkins [1921] NZLR 763
Moss v. Perpetual Trustees and Agency Co. [1923] NZLR 264; NZGLR 525
Re Bayley Worthington and Cohen's Contract [1909] 1 Ch 648

Legislation referred to:
Civil Law Act 1956, s. 11
Rules of the High Court 1980, O. 81, O. 42 r. 12

For the plaintiff - R.J. Manecksha; M/s. Lim Kean Siew & Co.
For the defendants - Patrick Y.C. Chen; M/s. Allen & Gledhill

JUDGMENT

Edgar Joseph Jr J:

This is a summons for summary judgment under O. 81 of the Rules of the High Court 1980, for refund of a sum of RM183,900, being payment to account of the purchase price paid by the plaintiff purchaser to the defendant vendor under a sale and purchase agreement dated 20 February 1982 for an apartment in a multi-storey tower block known as "E & O Puri", the construction of which could not be proceeded with due to substructural failure and for interest thereon.

Before me, it was accepted by Counsel for the defendant that the payments to account, the breakdown of which was as follows:

On 14 January 1982	RM53,000
On 20 February 1982	RM 8,300
On 11 June 1982	RM61,300
On 20 October 1982	RM61,300

were refundable with interest thereon at the rate of 8% p.a. from date of accrual of cause of action, which it was said was 1 January 1986, until date of judgment, reliance being placed on s. 11 of the Civil Law Act 1956, and, thereafter, interest at the same rate, until realisation.

On the other hand, Counsel for the plaintiff contended for interest at the rate of 8% p.a. on the four sums aforesaid from the date of each of such payments to the date of judgment and, thereafter, interest at the same rate on the aggregate of such sums until realisation. The contest was thus limited to the sole question: What is the pre-judgment period in respect of which interest at the agreed rate of 8% p.a. was payable?

Before I embark upon a consideration of the issue which arises for decision it is necessary to set out, by way of background, certain plain facts which are not in dispute.

Following the execution of the sale and purchase agreement aforesaid, whereby the plaintiff had agreed to purchase the apartment at a price of RM613,000 to be paid by instalments stipulated therein and the defendant had agreed to sell the same, undertaking to give vacant possession thereof not later than December 1985, the defendant was unable to complete the construction of the Tower Block which was to comprise the apartment, because the substructure thereof, constructed by its contractor, could not withstand the load of the main structure.

In consequence, there were negotiations for settlement as regards the rate of interest payable on the payments to account of the purchase price aforesaid and as to the date when interest should run but unfortunately the parties were unable to agree on both these issues with the result that the action herein was commenced followed shortly thereafter by the application for summary judgment.

So much for the background to the case. I must now revert to the issue which arises for decision.

Now the principle underlying the award of interest is not to compensate a plaintiff for any damage done, but for him being kept out of his money: see The *London, Chatham Dover Railway Co. v. The South Eastern Railway Co.* [1893] AC 429, 437.

As for the question what rate of interest the Court should award in respect of the prejudgment period no issue arises since, as I have already noted, the parties had agreed on a rate of 8%, although during the negotiations for settlement, there was a conflict as to this. Nevertheless, I would remark, in passing, that several different rates may be given regard being had to the circumstances of each case, the more obvious ones being as follows:

(a) the judgment debt rate; that is to say, the rate payable under O. 42 r. 12 of the Rules of High Court.

(b) short term investment account rate.

(c) the commercial rate; meaning how much did the plaintiff have to pay on borrowing the money or would he have to pay had he borrowed the money?

(d) the investment rate - meaning how much would his return have been had the plaintiff invested the money?

(e) the foreign investment rate; meaning the going rate of interest of the country in whose currency the judgment is given.

I now pass on to consider the sole question for decision in this case which, as I have already said, is what is the prejudgment period for which interest at the agreed rate of 8% p.a. should be paid, in the particular circumstances of this case?

There is authority for saying that in the case of personal injury claims, interest on general damages for pain and suffering is normally awarded from the date of service of the writ and, on special damages, from date of accident (see, for example, *Murtadza bin Mohamed Hassan v. Chong Swee Pian* [1980] 1 MLJ 216, 218) whilst in the case of economic loss claims, it is from the date of the loss or the date on which the cause of action accrued.

In an action for recovery of the deposit paid under a contract of sale and purchase the Court has a discretion as to whether or not to allow interest, and as to from what date it should be calculated. Where the non-completion is the fault of the vendor, and such fault existed at the date of the contract, as for example, not having any title, interest will be allowed from the date of payment as a rule. It is not difficult to cite an anthology of cases in support of this proposition. My choice of cases is as follows; *Macdonald v. Marson* [1913] 33 NZLR 248, 16 NZGLR *330;In Re Hargreaves and Thompson's Contract* [1886] 32 Ch. 454; *Turner v. Marriott* [1867] LR 3 Eq. 744 (good title not deduced); *Day v. Singleton* [1899] 2 Ch. 320 (vendor unable to procure lessor's consent to assignment of lease); *Carlish v. Salt* [1906] 1 Ch. 335 (vendor failing to disclose a party wall notice prior to contract); *Re Bryant & Barningham's Contract* [1890] 44 Ch. D 218 (trustees without an immediate power of sale);

Weston v. Savage [1879] 10 Ch D 736 (title defective); *Skinner v. James Syphonic Measures Ltd.* [1927] 28 SR (NSW) 20 and *Power v. Atkins* [1921] NZLR 763 (misrepresentation by vendor).

However, if the circumstances warrant it, interest may be allowed only from the date of the purchasers repudiation of the contract: *Moss v. Perpetual Trustees and Agency Co.* [1923] NZLR 264, NZGLR 525.

Now, clearly, taking a wrong view of the law, even if reasonably held, constitutes a default: see *Re Bayley Worthington and Cohen's Contract* [1909] 1 Ch. 648. So, perhaps, understandably in the present case, there was no dispute that non-completion was due to the fault of the defendant. But when did this fault first exist? The answer to this question must be when the defendant first became aware as a result of the opinion of their experts that the existing substructure was substantially not in accordance with the contractual specifications and could not therefore be retained without considerable risk to the proposed superstructure. It was agreed by Counsel that the defendant had accepted the opinion of their experts most probably on 1 July 1983.

It is my view, therefore, that at the latest, this last mentioned date was, when the defendant ought to have, but did not, write to the plaintiff enquiring if he was prepared to wait for the substructure to be completely demolished and a new one meeting designed specifications reconstructed **or** if he wished to rescind the contract of sale and purchase and have a refund of the four payments he had made. But, it was not until 16 October 1984 that the defendant took this elementary step. (See its letter Ex. L2 p. 1 to encl. 5.). In these circumstances, the defendant was guilty of inordinate delay and so, to this extent, it was at fault.

I might add, in passing, that it is unnecessary to decide if the defendant had decided to abandon the project but, I note in passing, that in its defence, it had admitted that because of the defective substructure, the project could not be proceeded with and, indeed, to the present day - some nearly five years later - it appeared that no attempt has been made to do so.

I would accordingly in the exercise of my discretion, award interest at the agreed rate of 8% p.a. on the aggregate of the four sums aforesaid from 1 July 1983 until date of judgment, and thereafter, pursuant to O. 42 r. 12 of the Rules of High Court, at the same rate, until realisation.

There will, of course, also be judgment for the plaintiff for the return of the aggregate sums paid under the sale and purchase agreement, amounting to RM183,900 and the costs of this application.

Finally, general damages suffered by the plaintiff (if any), as a consequence of the defendant's breach of the sale and purchase agreement, shall be determined by the Senior Assistant Registrar of this Court upon enquiry.

Also found at [1988] 2 CLJ 671